Supreme Court, U. S.
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No. 79-1862.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

GLOBE NEWSPAPER COMPANY,
Appellant,

v.

THE SUPERIOR COURT
FOR THE COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief in Opposition to Motion to Dismiss.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Pursuant to Rule 16.5 of the current rules of this Court, appellant, The Globe Newspaper Company, submits this brief in opposition to the Motion to Dismiss filed by appellee. Appellant does so for the purpose of addressing appellee's assertion that this case has been rendered moot by this Court's decision

in *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 U.S.L.W. 5008 (July 2, 1980) (No. 79-243).[1]

Three equally-unavailing arguments are presented by appellee in support of its contention that the present case is moot. First is the argument that the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts from which this appeal is taken "substantially constricted the operation of" Mass. G.L. c. 278, § 16A, the statute which the appeal concerns (Motion to Dismiss at 3). As a result, appellee argues, "the *Globe* now stands in a far better position as a result of the decision below, and no longer confronts the certain and recurrent prospect of complete exclusion from the whole of a trial of a sexual offense against a minor victim . . . ." (*Id.* at 4.)

True it is that the decision from which the present appeal is taken narrowed the sweep of § 16A. True it also is, however, that, even as narrowed, § 16A requires exclusion of the press and public from part of each and every trial to which the statute applies. Even as narrowed, the statute admits of no discretion on the part of the individual trial judges to allow anyone into the courtroom while critical testimony is being proffered. Even as narrowed, the statute permits no account to be taken, for example, of the victim's desire to testify in public, of the age and apparent maturity of the victim, of the type of "crime involving sex" with which the defendant is charged or of a host of other factors which might well make the partial closure mandated by § 16A inappropriate. Even as narrowed,

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[1] In addition to arguing that the case is moot, appellee argues that it presents no substantial federal question and that the appeal should be dismissed for that reason as well. That substantial federal questions are presented by this appeal was demonstrated in the Jurisdictional Statement. That substantial federal questions are present also is a conclusion which clearly emerges from a comparison of the issues presented by this case with those decided in *Richmond Newspapers*. As a consequence, no further time will be spent on that issue on this brief.

in sum, § 16A *permits* no inquiry of the type which this Court held in *Richmond Newspapers* was a necessary precondition to any valid order of closure in light of the command of the First Amendment to the Constitution. *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 U.S.L.W. 5008, 5015 (July 2, 1980) (No. 79-243).

The fact that the decision of the Supreme Judicial Court may have left appellant in a somewhat better position than it was at the commencement of this litigation, then, does not mean that the present appeal is moot. *Compare, e.g., County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (a case is moot if, *inter alia*, "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"); *SEC* v. *Sloan*, 436 U.S. 103, 109-10 (1978). To be sure, the Supreme Judicial Court's decision potentially reduces the magnitude of the asserted violation of appellant's rights which is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). That decision does not, however, reduce the certainty that appellant will be excluded in the future from at least a portion of a criminal trial by virtue of § 16A. In addition, the decision does not increase the likelihood that appellant's opportunity to litigate fully the propriety of any future exclusion will be more satisfactory than the insufficient opportunity it had in the present case. *Compare, e.g., Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 U.S.L.W. 5008, 5010 (July 2, 1980) (No. 79-243).

Appellee's second argument in support of its assertion that the present case is moot is somewhat difficult to follow. Essentially, however, that argument appears to consist of two parts. The first is that the Supreme Judicial Court "never had the opportunity to judge [the constitutionality of] § 16A in light of the First Amendment right of the press to attend crimi-

nal trials as declared in the *Richmond Newspapers* decision." (Motion to Dismiss at 5.) Second, the argument continues, because the Supreme Judicial Court did not have that opportunity, no one can reasonably predict what it will do when it does and thus no reasoned conclusion now can be reached concerning the results of the next constitutional challenge to the statute (*id.* at 5-6).

Three answers to appellee's argument immediately appear. First, although it is clear that the Supreme Judicial Court rendered its decision in the present case prior to this Court's decision in *Richmond Newspapers* and thus did not have an opportunity to consider the views expressed by this Court in *Richmond Newspapers*, the Supreme Judicial Court clearly had an opportunity to consider, and was requested to consider, the First Amendment contentions made by appellant. It expressly declined to do so (App. 33a). For present purposes, the Court's decision not to consider those contentions amounts to a judgment that no such rights existed. *See* Jurisdictional Statement at 9-10.

Second, when a change in the law has occurred during the process which brings a case to this Court, this Court's virtually uniform practice has been either to apply to that case the law in existence at the time the appeal is decided by this Court, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 102 (1974); *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711-15 (1974); *United States* v. *Schooner Peggy*, 1 Cranch (5 U.S.) 103, 110 (1801), or to reverse and remand the case to the tribunal from which it came for reconsideration in light of the new legal development. *E.g.*, *Harlin* v. *Missouri*, 439 U.S. 459 (1979); *Board of Trustees* v. *Sweeney*, 439 U.S. 24 (1978); *Oregon State Penitentiary* v. *Hammer*, 434 U.S. 945 (1977); *Thorpe* v. *Housing Authority*, 386 U.S. 670 (1967). Passing the question whether *Richmond Newspapers* announced "new" law, *compare*, *e.g.*, 48 U.S.L.W. at 5015 (Stevens, J., concurring)

with, e.g., Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975); *Healy* v. *James*, 408 U.S. 169 (1972), the fact that the Supreme Judicial Court did not have before it this Court's decision in *Richmond Newspapers* in February of 1980 supports at most a conclusion that reversal and remand is in order. It does not support a conclusion that the case is moot.

Third, and finally, the assertion that no one can predict what the Supreme Judicial Court for the Commonwealth will do when it next confronts the issue of the constitutionality of § 16A as narrowed, far from supporting appellee's assertion that the case is moot, supports appellant's assertion that it is not. This Court, for sound reasons, has held that an essential ingredient of mootness is an ability to say "with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). So formulated, what might be called the burden of prediction is cast on the party who seeks to have the proceeding dismissed as moot. It is cast on that party because any other allocation of the burden could well result in the invincibly repetitive violations of constitutional rights the mootness principles articulated in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911) were designed to avoid. *See generally, SEC* v. *Sloan*, 436 U.S. 103, 109-10 (1978). Consequently, appellee's assertion concerning an inability to predict what the Supreme Judicial Court will do the next time it is faced with a question concerning the constitutionality of § 16A as narrowed is, quite simply, an assertion that the present case is not moot.

As a final argument concerning mootness, appellee asserts that the issues tendered to this Court after the decision of the Supreme Judicial Court are abstract and hypothetical (Motion to Dismiss at 6). Not so. The Supreme Judicial Court's decision concerning the mandatory aspect of § 16A had the effect of affirming the trial court's order excluding appellant from a

specific portion of a specific criminal trial over the timely protest of both appellant and the defendant in the criminal case. The Supreme Judicial Court's decision also approved of that exclusion even though there had been no particularized "overriding interest articulated in findings" for excluding the press and public from that particular trial. *Compare, Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 U.S.L.W. 5008, 5015 (July 2, 1980) (No. 79-243). It is difficult, therefore, to see how the issue appellant has raised concerning the mandatory portion of § 16A could be less hypothetical or less abstract.

Similarly, insofar as § 16A, as construed, invests the trial court with discretionary authority to close all or portions of certain criminal trials to the press and public when the victim is not testifying, the controversy presented to this Court is neither abstract nor hypothetical. To be sure, the standard for discretionary closure — whether closure is "necessary . . . to preserve evidence required for a just conviction," (App. 44a) — was not applied to appellant because appellant was summarily excluded from the entire trial under what appeared to be the statute's global force. Nevertheless, the question to be addressed now, in the wake of the Supreme Judicial Court's opinion and in the wake of this Court's opinion in *Richmond Newspapers*, is whether the standard for discretionary closure articulated by the Supreme Judicial Court constitutes the kind of "overriding interest" which this Court has said will alone provide a foundation for constitutionally-permissible closure. Appellant, of course, argues that it does not. More important for present purposes, however, is the fact that the "continuing and brooding presence" of that standard inevitably will affect the future ability of appellant to gain access to criminal trials. *Compare, Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122, 125-26 (1974). Beyond that, application of the standard to appellant may well produce irreparable injury, for

if the question concerning the propriety of the standard is not resolved now, appellant will be required to suffer exclusion from at least one more criminal trial before its rights can be vindicated. *See generally, Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. ____ , 48 U.S.L.W. 4162, 4165 (February 20, 1980) (No. 78-1335); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972). In sum, the controversy over the discretionary aspect of § 16A as construed by the Supreme Judicial Court is not moot.[2]

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[2]The cases cited by appellee in support of its third theory of mootness are all distinguishable. This Court dismissed the appeal in *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 575 (1947), because the procedural context for the state court's discussion of the statute at issue rendered that discussion so unclear and confusing that this Court was unable to determine how that statute had actually been construed. In the instant case, there is no similar ambiguity in the Supreme Judicial Court's explication of § 16A. In *Sanks* v. *Georgia*, 401 U.S. 144 (1971), the appeal was dismissed because the statute originally contested had been repealed and replaced by a new statute which eliminated the constitutional problem presented; in the case at hand, significant constitutional problems inherent in the statute remain. Finally, the Court's decision in *United States* v. *Fruehauf*, 365 U.S. 146 (1961), is also distinguishable in that, unlike the complicated factual and legal question presented there, this appeal presents a straightforward question of whether the statute as construed by the Supreme Judicial Court can survive constitutional scrutiny.

Conclusion.

For the foregoing reasons, and for the reasons discussed in the Jurisdictional Statement, appellant respectfully requests that the Motion to Dismiss be denied and that probable jurisdiction be noted.

Respectfully submitted,

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